

No. 42421-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LEWIS COUNTY CIVIL SERVICE COMMISSION, LEWIS COUNTY
SHERIFF'S DEPARTMENT, and LEWIS COUNTY,
Appellants,

vs.

HAROLD SPROUSE,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Harold Sprouse requests the Court of Appeals affirm the Superior Court, and reinstate him to his position with the Lewis County Sheriff's Department with full back pay and benefits. The Superior Court made the proper decision in reversing the Arbitrary, Capricious, Unconstitutional, and Legally Erroneous Decision of the Lewis County Civil Service Commission.

II. STATEMENT OF THE CASE

On March 16, 2009, the Lewis County Sheriff's Office received a telephone call reporting a possible runaway. (Grievant's Ex. 28, pg. 2). The child had just given birth, and was staying on Sheriff Mansfield's property with the Sheriff's son. *Id.* Deputy Sprouse responded to the call. *Id.* After speaking with the parents, Deputy Sprouse contacted Chief Criminal Deputy Gene Seiber, who said that the child was at the Mansfield compound. *Id. at 3.* The parents did not wish to report the child as a runaway at that point, and simply wished to verify the child was safe. *Id.* Because the allegations involved Sheriff Mansfield, the elected Sheriff over the Lewis County Sheriff's Department (Dept.), Deputy Sprouse felt that the Dept. had a potential conflict of interest in the matter, and that he had been placed in an untenable position. (RP

236, ln. 25 – 237, ln. 4¹).

The parents subsequently called again, and reported that the child was a runaway. (Greivant's Ex. 28, pg. 3). Other deputies of the Dept. handled that call, but the runaway report was never filed in the proper runaway databases as required by law. *Id.* at 3 – 7. Chief Seiber indicated that he was to be contacted directly before anyone contacted any parties in the case. *Id.* The parents said that they would like the State Patrol to look into the matter, but were told it would be handled internally. (RP 86, lns. 18 – 22). The matter was resolved over the next several days when members of the Lewis County Sheriff's Department escorted Child Protective Services to the Mansfield compound. (Greivant's Ex. 28, pg. 3 – 7). Deputy Sprouse was not involved after the initial call. At the behest of the Lewis County Sheriff's Guild, the matter eventually was forwarded to the Washington State Attorney General's Office (AGO) to investigate any potential wrongdoing on the part of the Dept., including Sheriff Mansfield. *Id.* Sheriff Mansfield indicated that he would get even with whoever made the complaint against him. *Id.* at 8. The Washington State Patrol (WSP) conducted the AGO investigation. *Id.* at 1. Although no criminal charges resulted from the investigation, the AGO determined that the Dept. as a whole, and Sheriff Mansfield in particular, had willfully neglected to perform their duties and engaged in misconduct, much of which could have been

¹ For simplicity Respondents herein have followed the naming conventions used by Appellants, e.g. RP for Report of Proceedings before the Civil Service Commission on April 19, 2010; RP2 for Report of Proceedings before the Commission on April 20, 2010, and so on.

avoided if it had been handled by an outside agency. *Id.* at 10 – 14.

During the course of the AGO investigation, the WSP contacted Deputy Sprouse for an interview about his initial contact with the parents. (RP 241, Ins. 9 – 11). Deputy Sprouse requested a copy of the Dept. report in order to be able to refresh his memory if needed during the WSP interview. (RP 241, Ins. 12 – 15). At some point during the WSP investigation, however, the Dept. report was leaked to the local newspaper. (RP 102, Ins. 17 – 21). The investigation into the leak was again handled internally by the Dept., rather than being referred to the WSP. (RP 102, Ins. 17 – 21).

The Dept. retrieved Deputy Sprouse's copy of the report, where they found fingerprints belonging to Deputy Sprouse's son and his son's girlfriend. (RP 104, Ins. 3 – 5). Instead of assigning a sergeant to investigate, the Dept. sent Commander Aust and Chief Civil Deputy Stacy Brown, extremely high ranking members of the Dept. to Deputy Sprouse's house without notice to him, to interview his son and his son's girlfriend. (RP 104, ln. 21 – 105, ln. 3). No determination was made as to the source of the leak, but Deputy Sprouse received an 18-month timed letter of reprimand for not properly securing the report at his home. (RP 114, Ins. 7 – 8; Sheriff's Ex. 4). Although Deputy Sprouse might not have liked the timed letter, he did not receive any reduction in pay or benefits. (RP 256, ln. 11 - 16). That letter was appealed through personnel channels, and is not an issue here. (Grievant's Ex. 34, Sheriff's

Ex. 28, p.3).

Even so, the manner in which the investigation was conducted seemed to Deputy Sprouse to be out of line with other investigations. (See e.g. RP 42, lns. 13 – 17). Since the entire episode had its roots in potential misconduct by the Dept. and Sheriff Mansfield, Deputy Sprouse felt that the investigation by Cmdr. Aust and Chief Brown was heavy-handed, and that it was designed to intimidate him or harass him for his repeated requests that an outside agency investigate the entire affair. (RP 38, ln. 22 – 39, ln. 3; RP 251, ln. 14 – 252, ln. 7). At that time, the AGO report was still pending. *Id.*

Deputy Sprouse expressed his concerns to at least two members of his chain of command, Sgt. Breen and Sgt. Snaza, each of whom told him that in their opinion, nothing that had occurred amounted to harassment or intimidation of a witness. (RP 38, ln. 21 – 39, ln. 2; RP 75, lns. 19 – 21). On October 24, 2009, however, Sgt. Snaza told Deputy Sprouse to meet with Sgt. Smith later that day for a fact finding investigation. He instructed Deputy Sprouse to refrain from speaking to anyone about his concerns, other than his Guild representative. (RP 47, lns. 2 – 14). This reinforced Deputy Sprouse's concerns that, because Sheriff Mansfield was involved, the Dept. should not be the agency conducting the investigation. Indeed, Deputy Sprouse viewed the instruction as being direct evidence of witness tampering, since as far as he knew, the investigation into the Dept. was ongoing. (RP 77, lns. 13 –

21; RP 244, lns. 1 – 4; Rp 251, lns. 12 – 54). Not knowing where else to turn, and worried that the investigation could turn into a witch hunt and cost him his job, Deputy Sprouse contacted the Lewis County Prosecutor's office by telephone and made a verbal report about possible witness tampering or intimidation. (RP 243, ln. 21 – 242, ln. 9). DPA Richardson received the call.

The prosecutor's office, again recognizing the potential for a conflict of interest, immediately turned the matter over to the AGO. (RP 221 lns. 12 – 17). The WSP looked into the matter, and decided that criminal charges were not warranted. Deputy Sprouse was subsequently terminated for making that call. (Sheriff's Ex. 29).

The Lewis County Civil Service Commission (Commission) made findings that Deputy Sprouse's actions did not violate his chain of command, that his conduct was not insubordinate, and that he was not untruthful in his interview with Sgt. Smith, all of which were allegations made by the Dept. as bases for termination. (Commission, Decision After Hearing (Decision), p.7, ln. 20 – 8, ln. 4). Nonetheless, the Commission found that Deputy Sprouse was without a good faith belief that a crime was committed, and thus that he was terminated in good faith for cause. *Id.* That fourth finding and the resulting decision to uphold the termination were the subject of Deputy Sprouse's appeal to Superior Court. Deputy Sprouse continues to maintain that the Finding and Decision of the Commission were in error.

Among the assignments of error cited by Deputy Sprouse were that the directive given not to discuss his concerns with anyone was unconstitutional; that the Commission Decision to uphold the termination for exercising constitutional rights was unconstitutional; that the Finding that Deputy Sprouse lacked a good faith belief to report his suspicions was not supported by substantial evidence; that the Finding that Deputy Sprouse lacked a good faith belief to report his suspicions was clearly erroneous; that the Finding that the termination was in good faith for cause was not supported by substantial evidence; that the Decision upholding the termination was not supported by the Findings and was arbitrary and capricious; that the Decision to uphold the severe, disproportionate sanction of termination was arbitrary and capricious, and that the Decision to uphold the severe, disproportionate sanction of termination was an error of law.

The Superior Court found in Deputy Sprouse's favor, and he was ordered reinstated. The Dept. has appealed that decision.

III. ARGUMENT

a. Standard of Review

A reviewing court shall grant relief from an agency order only for a limited number of reasons. *RCW 34.05.570*. Among these reasons are that the order violates constitutional principles; that the agency has erroneously interpreted or applied the law; that the order is not supported by substantial evidence; that the order is inconsistent with a rule of the

agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or that the order is arbitrary or capricious. *RCW 34.05.570(3)*. See also *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 588 (2004); *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *City of Seattle v. City of Seattle*, 155 Wn. App. 878, 230 P.3d 640 (2010).

The Court of Appeals reviews the same record considered by the trial court and must exercise independent judgment to determine whether the Commission acted arbitrarily, capriciously, or contrary to law. *Greig v. Metzler*, 33 Wn.App. 223, 226, 653 P.2d 1346, 1347 (1982) (citing *Benavides v. Civil Service Comm'n*, 26 Wn.App. 531, 613 P.2d 807 (1980); *Eiden v. Snohomish Cy. Civil Service Comm'n*, 13 Wn.App. 32, 533 P.2d 426 (1975)).

Findings of fact are reviewed to determine if they are supported by substantial evidence, and conclusions of law are reviewed de novo to determine if the law was applied correctly. *Morgan v. Dep't of Soc. & Health Services, State of Washington*, 99 Wn.App. 148, 151, 992 P.2d 1023, 1025 (2000) (citing *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983)); *RCW 34.05.570*. "Under the error of law standard, the court engages in a de novo review of the agency's legal conclusions. The court, however, will give substantial weight to the

agency's interpretation when it falls within the agency's expertise and special area of the law. Findings of fact are reviewed under the substantial evidence standard.” *Hensel v. Dep't of Fisheries*, 82 Wn.App. 521, 525-526, 919 P.2d 102, 104 (1996) (*internal citations omitted*); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash 2d 568, 588, 90 P.3d 659, 670, (2004) (*citing Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982) (*explaining that mixed questions of law and fact require the court to determine the correct interpretation of the law independent of the agency's decision, and then apply the law to established facts de novo*)).

A court should overturn an agency's factual findings only if they are clearly erroneous, and the court is “definitely and firmly convinced that a mistake has been made.” *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 588 (2004) (*citing Schuh v. Department of Ecology*, 100 Wn.2d 180, 183, 667 P.2d 64 (1983); *and quoting Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). An “agency finding is clearly erroneous, when, although there is evidence to support the finding, the reviewing court is left with definite and firm conviction that a mistake has been committed based on entire record; substantial evidence, similarly, is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Dana's Housekeeping, Inc. v. Dept. of Labor and Ind. of State of Wash.* 76 Wn.App. 600, 886 P.2d 1147 (1995) (*reconsideration denied, review*

denied 127 Wn.2d 1007, 898 P.2d 307). Unchallenged Findings are treated as verities on appeal. *Fuller v. Employment Sec. Dept. of State of Wash.*, 52 Wn. App. 603, 606, 762 P.2d 367, 369-70 (1988). The court does not weigh the credibility of witnesses or substitute its own judgment for the agency's with regard to findings of fact. *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 588 (2004) (citing *Bowers v. Pollution Control Hr'gs Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000) review denied, 144 Wn.2d 1005, 29 P.3d 717 (2001)).

An agency's decision "is arbitrary or capricious if it is willful and unreasoning action in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached." *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202 (1994) (citing *Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 850, 613 P.2d 1148 (1980); *Sherwood v. Grant Cy.*, 40 Wn. App. 496, 501, 699 P.2d 243 (1985)). People have a fundamental right to be free of Agency actions that are arbitrary and capricious. *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn. 2d 690, 694, 658 P.2d 648, 651 (1983) (citing *Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 221-22, 643 P.2d 426 (1982)). The Court of Appeals "may reverse an administrative decision only if: (1) the administrative decision was based on an error of law; (2) the decision was not based on substantial evidence when viewed in the light of the record as a whole;

or (3) the decision was arbitrary or capricious. The appellate court applies these standards directly to the record before the administrative agency.” *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 670, 929 P.2d 510, 513 (1997) (citing *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn.App. 403, 407, 914 P.2d 750 (1996); *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)).

If this had been an appeal that was taken under a statutory writ of certiorari, as the Dept.’s cross-appeal of the Decision was, the review would have been even more limited. *Hilltop Terrace Homeowner’s Ass’n v. Island County*, 126 Wn. 2d 22, 29, 891 P.2d 29, 33 (1995).

b. Review of the Civil Service Commission Decision

Following Deputy Sprouse’s successful Appeal to Superior Court, the Dept. appealed the matter. The Dept. appears to have made one assignment of error with eight subparts relating to issues with that assignment of error, designated a – h. The claim of error made by the Dept. was that the Superior Court substituted its own judgment for that of the Commission regarding Deputy Sprouse’s report to the prosecutor, and that was repeated in Dept. subpart (b). Following the Dept.’s argument is not entirely straightforward, however, as the Dept. did not directly address a – h.

Turning to subpart (a) of the Dept.’s Assignments of Error, the Dept. queried whether the Superior Court was limited to the

Commission's Decision in making its determination. The answer is clearly 'No'. The Superior Court sits as an appellate court when reviewing the Decision. *Slayton v. Dep't of Soc. & Health Services*, 159 Wn. App. 121, 128, 244 P.3d 997, 1000 (2010). As part of that role, the reviewing court considers the record that was presented to the Commission. *Greig v. Metzler*, 33 Wn.App. 223, 226, 653 P.2d 1346, 1347 (1982). If the scope of review were narrowed, the reviewing court would be left with little to determine, except perhaps whether the Decision of the Commission was internally consistent. Put another way, the reviewing court must be able to review the same record as was considered by the Commission (or another agency), in order to be able to ascertain whether there actually was a basis at all for any decision that was made. A decision that was entirely unconstitutional, arbitrary, capricious, contrary to law, and wholly false could still be made to appear valid on the face of the written Decision.

In subpart (b) the Dept. simply rephrases the question asked in Assignment of Error 1. In so doing, the Dept. assumes that the Superior Court substituted its judgment for that of the Commission. Although there is no evidence that such a substitution occurred, a closer look at the situation may be informative. At no point did the Superior Court make any determination as to which witnesses were more or less credible, or in any other way substitute its own judgment for that of the Commission. What did occur, however, is that the Superior Court reviewed the whole

record, and was left with a definite and firm belief that the Commission made a mistake. Furthermore, the question assumes that Deputy Sprouse was disruptive.

Nothing in the record indicates that Deputy Sprouse was disruptive. Instead, the record reflects that Deputy Sprouse made every effort to prevent disruption, that he attempted to follow the rules, despite the inordinate amount of pressure and scrutiny to which he was subjected merely for having any suspicion about the Dept. (*See i.e.* RP 230, ln. 22 – 231 ln. 5; 235, lns. 6 – 17; 238, lns. 3 – 6; 243, ln. 21 – 244, ln. 4; 244, lns. 23 – 25; 251, lns. 20 – 24; 253, lns. 3 – 6). Although argued more fully *infra*, the evidence in the record reflects that the Decision was clearly in error. The record does not support it, and the Decision itself was internally inconsistent, with the Findings that were supported by the record offering no support for the conclusion.

c. The Correct Standard is Good Faith for Just Cause.

The Dept.'s Assignment of Error subpart (c) inquires into the appropriate standard for overturning the Commission. In general terms, the question to be decided by the court is whether the termination was made in good faith for cause. *RCW 41.14.120*. Although the statute does not define 'for cause', the Lewis County Sheriff's Department Collective Bargaining Agreement (CBA) does describe the standard to be applied as 'Just Cause'. (Grievant's Ex. 1, p.3, §4.1.1(b), p.26, §8.3.3). Under the CBA, any termination must be for just cause.

Washington courts have agreed that in the collective bargaining arena:

‘Just cause’ is a term of art in labor law, and its precise meaning has been established over 30 years of case law. Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty. Seven factors are considered in determining whether there was just cause for discipline, including whether the employer applied its rules even-handedly, and whether the degree of discipline was reasonably related to the seriousness of the infraction given the employee's record of service.

City of Seattle v. City of Seattle, 155 Wn. App. 878, 889, 230 P.3d 640, 644 (2010) (citing *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn. 2d 166, 173, 969 P.2d 474, 478 (1999)). The just cause standard is higher than the mere for cause standard. *Id.* The Dept. was constrained by the civil service ordinance from terminating Deputy Sprouse unless it was done in good faith for cause. “It was further constrained under the collective bargaining agreement because it voluntarily contracted” not to terminate Deputy Sprouse without ‘just cause.’ *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn. 2d 166, 174, 969 P.2d 474, 479 (1999). The proper standard is the just cause standard. The Commission made its Decision upon an inherently wrong basis. The Commission did not apply the just cause standard, and failed entirely to address the issue of how Deputy Sprouse’s Constitutional rights might affect that standard, as discussed *infra*.

Dept. subpart (d) is simply poorly worded. The Commission was tasked with determining whether Deputy Sprouse was terminated in good faith for cause. There are two prongs to that determination, good

faith and for cause. Deputy Sprouse was neither terminated in good faith, nor for cause, let alone for just cause, as required. Both parts are needed to uphold the termination. Even if it is assumed that the Commission itself acted in good faith (an assumption that is not made here as discussed *infra*), the underlying termination by the Dept. was not made in good faith. The Termination was made in retaliation against Deputy Sprouse, because the Dept. was unhappy that he would not ignore the misconduct of the Dept., as shown in the AGO report. (Grievant's Ex.s, 19, 28; Sheriff's Ex. 28, p.3; Sheriff's Ex. 14). Although the main issue of whether the termination was made in good faith for cause is discussed more fully below, the termination was entirely baseless, and was at its core done for nothing more than retaliation against a deputy who did his duty. As such, it does not indicate in any way that the termination was in good faith or for cause.

d. The Record does not Support the Claim of Retaliation.

The Dept. contends, and the Commission found, that Deputy Sprouse called the prosecutor in retaliation for the timed letter. The record does not support that Finding. As the Commission indicated, Deputy Sprouse "discussed on numerous occasions . . . this anxiety and belief that he was being intimidated as a potential witness in any action that might be brought against the sheriff." (Decision, p.3, Ins. 10 – 12). Deputy Sprouse was torn between his duty to the Dept. and his ethical duty to report potential wrongdoing. (RP 235, Ins. 6 – 17). The potential

conflict was even apparent during the earliest stages of the runaway matter. (RP 235, ln. 14 – 237, ln. 20). Upon receiving the report, Deputy Sprouse stepped forward to look into the matter. *Id.* He was relieved when he found out that the Sheriff's son and the runaway were within the statutorily allowed age limits. *Id.*

Although both Sgt. Breen and Sgt. Snaza would later indicate that they felt no crime had been committed, their testimony, and the testimony from every witness who had spoken with Deputy Sprouse, was clear that *Deputy Sprouse* felt that he was being intimidated, and that he viewed the order not to speak with anyone else as an extension of that intimidation. (RP 243, ln. 21 – 244, ln. 4; RP 30, ln. 21 – 31, ln. 10; RP 38, ln. 22 – 39, ln. 2; RP 39, ln. 20 – 40, ln. 11; RP 47, lns. 2 – 14; RP 60, lns. 3 – 15; RP 136, lns. 4 – 8; RP 137, lns. 9 – 23; RP 168, lns. 12 – 23). Even Chief Walton conceded that it might be intimidation. (RP 212, lns. 9 – 19). Sgt. Snaza testified that based on a meeting with Deputy Sprouse on October 17, 2009, he felt that Deputy Sprouse was angry about Cmdr. Aust and Chief Brown going to his house and interviewing his family without his knowledge, not about the timed letter. (RP 38, ln. 20 – 39, ln. 3).

It is not common for command staff to go to deputies' houses. (RP 108, ln. 21 – 109, ln. 2). Cmdr. Aust testified that he went to Deputy Sprouse's house with Chief Brown to question Deputy Sprouse's son, and that he had intended to call Deputy Sprouse prior to

questioning, but that his cell phone had no signal from Deputy Sprouse's home. (RP 108, lns. 2 – 14). Rather than waiting until they could speak with Deputy Sprouse, they proceeded with the interview, even though it was unusual to go to an employee's house. (RP 108, lns. 15 – 16; RP 109, lns. 1 – 2). It did not seem to matter to Cmdr. Aust at all that he was unable to reach Deputy Sprouse. Furthermore, they went at a time when they *knew* that Deputy Sprouse would not be home. (RP 107, lns. 22 – 25). Consequently, there was no way for Deputy Sprouse to know about their unusual visit until after it had already occurred. Sadly, the telephone call that was intended might have prevented the entire subsequent situation, yet it was not even attempted until they were already at the house. Had such a call been made, then any concerns Deputy Sprouse had about the visit could have been addressed, and the highly unusual situation might have been less intimidating.

Nevertheless, the visit was made, and the majority of the conversation between Deputy Sprouse and Sgt. Snaza on October 17 revolved around Deputy Sprouse's perception that Cmdr. Aust's *visit* amounted to Witness Tampering or Intimidation. (RP 39, ln. 18 – 43, ln. 17). Sgt. Snaza felt no tampering had occurred. *Id.* Sgt. Snaza offered to document the complaint, and forward it up the chain, but Deputy Sprouse indicated that he did not wish to do that yet, undoubtedly in response to Sgt. Snaza's assertion that he saw nothing improper. *Id.* Despite that, Sgt. Snaza made the report. (RP 44, lns. 13 – 25; Sheriff's

Exhibit 7). Indeed, Sgt. Snaza contacted Cmdr. Aust directly, despite the fact that Cmdr. Aust was one of the very people whose actions had concerned Deputy Sprouse. (RP 38, lns. 22 – 25; RP 45, lns. 21 – 22).

In the report to Cmdr. Aust, Sgt. Snaza further detailed his conversation with Deputy Sprouse. (Sheriff's Ex. 7). He reported that Deputy Sprouse intended to speak with his Guild representative about the disciplinary process. *Id.* Sgt. Snaza further indicated that Deputy Sprouse went well beyond that, and said that he felt the *investigation* process was excessive, and in light of the ongoing *investigation of the Sheriff*, was harassing, and possibly illegal. *Id.* Sgt. Snaza recalled that he did not see the investigation as malicious, but that he did not know why the investigation was not conducted by Deputy Sprouse's supervisor, as would normally be done. (RP 42, lns. 12 – 17; RP 58, lns. 1 – 6, ln. 25 – 59, ln. 13).

Sgt. Snaza felt that Deputy Sprouse had a basis for some of his concerns, particularly the concern related to having someone other than a deputy's supervisor conduct an investigation. (RP 58, lns. 11 – 23). In fact, standard operating procedure was to have a deputy's supervisor conduct fact finding inquiries. (RP 42, lns. 12 – 17; RP 58, lns. 1 – 6, ln. 25 – 59, ln. 13; Grievant's Ex. 1, CBA, p. 24, §8.2.1). This was later corroborated by Chief Seiber, who indicated that sergeants normally would have investigated initial matters, such as a leaked report. (RP 176, lns. 2 – 6). Chief Walton further explained that command staff

investigated instead of following the normal procedure and having sergeants investigate, because several sergeants were potential suspects in the leak. (RP 211, ln. 6 – 212, ln. 19). The fact that several sergeants were suspected only serves to underscore the conflicts that rippled throughout the department. This is particularly true since there was no Dept. policy regarding such internal investigations. Nothing should have been handled in-house, due to the incredible stresses created.

Sgt. Snaza and Deputy Sprouse also discussed the timed letter, and the fact that there was a process to address the letter. (RP 43, ln. 22 – 44, ln. 5). That process was being followed. (RP 139, lns. 19 – 23; Grievant's Ex. 34). Even Dept. Chief of Staff Walton acknowledged at the Loudermill hearing that the timed letter was unrelated to the termination. (Sheriff's Ex. 28, p.3).

Sgt. Snaza and Deputy Sprouse discussed the entire situation a couple of times, and Deputy Sprouse repeated that he felt an independent investigation should have been done. (RP 60, lns. 3 – 15; RP 230, ln. 22 – 231, ln. 5). Deputy Sprouse wanted to go up the chain of command to arrange a conversation with the Prosecutor. *Id.* Deputy Sprouse told several people, such as Detective Riordan, that he saw the Dept. actions in the investigation as potentially criminal, but that he (Sprouse) intended to go up the chain of command with that aspect of his concerns. (RP 267, lns. 15 – 17; RP 230, lns. 22 – 24). He wanted to follow the rules and "do it the right way." *Id.*

Deputy Sprouse next spoke about his concerns on October 18, 2009, with Sgt. Breen. (RP 74, ln. 25 – 75, ln. 2). Sgt. Breen testified that Deputy Sprouse talked to him about the investigation, and not about the timed letter, although he did recall that Deputy Sprouse said he had been disciplined. (RP 76, lns. 9 – 18). When discussing the discipline, Sgt. Breen recalled that Deputy Sprouse was “just talking. We were having a natural conversation about it.” *Id.* There was no testimony that Sgt. Breen thought in any way Deputy Sprouse was angry about having received the letter.

The thrust of the conversation was about Deputy Sprouse’s concerns relating to the investigation into the leaked report. (RP 76, ln. 21 – 77, ln. 21). Deputy Sprouse told him that the investigation should have been conducted by an outside agency. *Id.* He also told Sgt. Breen that he was considering reporting the matter to the prosecutor’s office. (RP 86, ln. 23 – 87, ln. 6). For his part, Sgt. Breen never indicated to Deputy Sprouse any opinion regarding whether speaking to the prosecutor would be appropriate, because even he “didn’t know if it would be or not, given the circumstances.” (RP 98, ln. 21 – 99, ln. 4).

Sgt. Breen was among those who were investigated regarding the leaked report, and he found the experience frustrating. (RP 76, ln. 21 – 77, ln. 10; RP 88, ln. 21 – 89, ln. 21). He also had concerns about his job security, even just being under suspicion. *Id.* Despite this, he did not perceive the investigation as improper. (RP 90, lns. 5 – 6). Sgt. Breen did

concede that in hindsight the investigation should have been done differently, at least to prevent the appearance of bias. (RP 99, ln. 21 – 100, ln. 6). He suggested that if Deputy Sprouse had concerns about Cmdr. Aust, then he should speak to Chief Seiber, but that Deputy Sprouse was concerned the entire administration was complicit. (RP 78, lns. 8 – 14). Det. Riordan was also a suspect in the leaked report. (RP 268, lns. 3 – 23). He was clearly concerned about the investigation, and wanted to ensure they had the “full story of what actually occurred.” *Id.*

Like Sgt. Snaza before him. Sgt. Breen made a report of his conversation with Deputy Sprouse. (Sheriff’s Ex. 6). He titled his report as a “Harassment complaint”, since Deputy Sprouse believed that he was being harassed. *Id.* During a later conversation with WSP Det. Hughes, Det. Hughes revealed to Sgt. Breen that Deputy Sprouse had spoken with DPA Richardson about his concerns of witness tampering. (RP 81, lns. 17 – 21). Sgt. Breen reported the information to Chief Seiber. (Sheriff’s Ex. 9).

Sgt. Breen had conducted part of the investigation into the initial runaway matter. (RP 86, lns. 16 – 22). Despite this, he felt that the Dept. was more than able to handle the investigation internally, and that an outside investigation should have been avoided. *Id.* Although the parents reported their daughter as a runaway, Sgt. Breen did not enter her into the runaway database as required by law. (RP 91, lns. 9 – 11). Upon following up later, he was informed that the decision had been made by

his superiors not to enter the information until the following Monday. (RP 92, lns. 10 – 20). Unlike Deputy Sprouse, Sgt. Breen was never investigated or disciplined for failing to do his duties under the law. *Id.*

In the week following the October 17, 2010, meeting, Sgt. Snaza also contacted Cmdr. Aust, who decided that Sgt. Smith would conduct a follow-up investigatory meeting with Deputy Sprouse. (RP 45, ln. 21 – 46, ln. 4). On the morning of October 24, 2009, Sgt. Snaza told Deputy Sprouse that Sgt. Smith would be following up on his concerns, and that he could only speak to his Guild representative, nobody else. (RP 47, lns. 2 – 14). It was an unusual directive, but one that he had given previously. (RP 47, lns. 19 – 25).

Deputy Sprouse viewed the directive as more evidence that he was being harassed, and he perceived the directive in the most obvious way, given what he knew of the situation. (RP 232, lns. 3 – 21). He was being investigated for even reporting the possibility of wrongdoing by his chain of command to his supervisors. *Id.* Specifically, he saw the directive not to speak to anyone as an order to withhold evidence or information in an ongoing investigation – an investigation that he had repeatedly requested be handled by an outside organization. (RP 60, lns. 3 – 14; RP 243, ln. 21 – 244, ln. 4; RP 244, lns. 23 – 25).

At that moment, everything that Deputy Sprouse had been told by his supervisors about insufficient evidence of tampering vanished. He had just been ordered not to talk to anyone. If the WSP had called about

the investigation, as Deputy Sprouse thought likely due to their ongoing investigation, he would have been forbidden to answer their questions, despite his role in the initial investigation. (RP 77, lns. 13 – 21; RP 251, lns. 12 – 24). He felt he was being ordered to be part of a cover-up, to stonewall, and it violated everything he stood for. (RP 244, lns. 1 – 4). He wanted to “bring pressure down” on the Dept., but the evidence shows that the pressure in no way related to the personnel matter. (RP 250, lns. 24-25). The evidence is clear that Deputy Sprouse believed that the Dept. was engaged in improper activity, and that he wanted that improper activity to stop. The ‘pressure’ was to get the Dept. to do the right thing, which never occurred.

As DPA Richardson testified, Deputy Sprouse then called the prosecutor’s office, and reported that he felt he had been given an illegal order. (RP 30, ln. 21 – 31, ln. 10; RP 244, lns. 23 – 25). He reported that the order was, in his view, an attempt to tamper with, or intimidate a witness. *Id.* DPA Richardson forwarded the report of the illegal order to Prosecutor Michael Golden, who forwarded the matter to the WSP and the AGO. (RP 220, ln. 25 – 221, ln. 17). The AGO was already conducting an investigation into the underlying matters involving the sheriff’s son, and Golden immediately recognized that any new allegations related to that should also be investigated from the outside. (RP 223, lns. 7 – 16). Even if the report had related to personnel as the Dept. contends, a disciplinary matter related to the report of a crime

would still be reported to the Prosecutor's Office. (RP 225, ln. 16 – 226, ln. 1).

Later that same day, Deputy Sprouse met with Sgt. Smith. (RP 135, lns. 8 – 9). Sgt. Smith recalled that Deputy Sprouse was very upset about the instruction not to talk to anybody. (RP 136, lns. 4 – 13). Sgt. Smith clarified that he only meant to wait to discuss anything until after they met. (RP 141, ln. 20 – 142, ln. 24). Just like Cmdr. Aust's failure to call before going to Deputy Sprouse's house, had the scope of the order been clear from the outset, Deputy Sprouse might never have made his call. (RP 245, lns. 3 – 11). Sgt. Smith reiterated the same concerns the other sergeants had voiced with respect to the alleged tampering. (RP 138, lns. 16 – 22). He indicated that he didn't perceive any tampering, but that he could understand that his view might be perceived as suffering from a conflict of interest. *Id.* Sgt. Smith's potential conflict would have been heightened, since his supervisor was Cmdr Aust. (RP 171, lns. 1 – 3).

Sgt. Smith specifically asked about Deputy Sprouse's conversations with Sgt. Snaza and Sgt. Breen, but his impression was that those were the only people with whom Deputy Sprouse had spoken. (RP 140, lns. 13 – 15). Although he knew that Deputy Sprouse had mentioned contacting the prosecutor, Sgt. Smith did not ask if Deputy Sprouse had eventually made that call, or if he had spoken to anyone else. (RP 160, lns. 1 – 8). During the conversation, Sgt. Smith did not

feel that Deputy Sprouse was being evasive or was avoiding answering his questions, and Deputy Sprouse had no intention of deceiving Sgt. Smith. (RP 158, lns. 16 – 21; RP 248, lns. 11 – 16). The conversation was passionate, but not rude. (RP 160, lns. 16 – 25). Deputy Sprouse was very upset over what he saw as harassment and intimidation, and the directive not to talk to anybody. (RP 162, lns. 15 – 18; RP 244, lns. 1 – 4, 23 – 25). Of particular significance, Sgt. Smith was unaware of the Lewis County Whistleblower Policy. (RP 164, lns. 17 – 19). Sgt. Smith did not ask directly about any calls to the prosecutor until a later meeting on about October 30, 2009. (RP 145, lns. 6 – 10; RP 247, lns. 10 – 22). At that time, Deputy Sprouse readily stated that he had spoken to the prosecutor. (RP 145, lns. 6 – 10).

Subsequently, at a pre-disciplinary hearing, Chief Brady asked Deputy Sprouse what had changed to make him decide to call the prosecutor. (Sheriff's Exh. 24 at 3). Deputy Sprouse:

... replied, "it was the order with Sgt. Snaza, right at that point. When I was basically told in my response to my request that something be addressed involving possible criminal activity by the department, I was told I was being investigated for the procedures I used to bring this to their attention, and ordered not to talk to the Prosecutor's Office that I decided this needs to go to the Prosecutor's Office. That's what changed."

Id. At that exact moment Deputy Sprouse felt that a witness had been told to "withhold from a law enforcement agency information which he or she has relevant to a criminal investigation". *Id.*; RCW 9A.72.120.

Despite this, members of Deputy Sprouse's command insisted that he never was able to articulate a reason. (RP 178, lns. 1 – 5).

In response to specific and narrow questions, Deputy Sprouse indicated more than once that nobody had ordered him to avoid the investigation or to lie, but that wasn't the point. (RP 117, lns. 16 – 24). He indicated that there had been no direct threats, and he had not been told how he should testify. (RP 106, ln. 19 – 107, ln. 1; RP 117, lns. 16 – 24; RP 138, lns. 4 – 10).

These had not been Deputy Sprouse's concerns. (RP 244, lns. 1 – 4, 23 – 25). It was not a question of direct threats, or a direct order of how to testify; it was a question of feeling intimidated into silence by their acts, especially once it was combined with an explicit order not to talk. Deputy Sprouse had once seen a suspect's friend walk out of court and glare at a witness. (Sheriff's Ex. 3, p. 3). That person was charged with witness tampering. *Id.* Deputy Sprouse attempted to explain his concerns at the pre-disciplinary hearing, but he was denied the opportunity to explain. (RP 250, lns. 3 – 11). He was concerned that the heavy-handed investigation was designed to intimidate him into silence, and viewed the directive not to talk as an overt attempt at a cover-up. (RP 244, lns. 1 – 4). Deputy Sprouse was concerned that when he inquired of his supervisor whether he saw any wrongdoing in the earlier investigation, that he was immediately the subject of a separate fact finding investigation. (RP 243, lns. 21 – 24). It was the totality of the

concerns, viewed together, that formed his concerns.

Despite those concerns, Deputy Sprouse never said that anyone was a criminal, only that he felt an outside investigation was needed. (RP 244, lns. 7 – 9, 18 – 20). Deputy Sprouse was emphatic that he perceived he was the victim of a potential crime. (RP 266, lns. 10 – 11; Sheriff's Exh. 24).

In sum, the evidence was clear that Deputy Sprouse made the call because of his concerns about intimidation, or perhaps witness tampering. The testimony of Deputy Sprouse, and the testimony of the other witnesses who spoke with him clearly indicated that these were his concerns, and not the timed letter. The Finding of the Commission that the call was made in retaliation was not only not supported by substantial evidence, it was not supported by any evidence.

e. Deputy Sprouse was Required to Call the Prosecutor.

As discussed before the Commission, both the State of Washington, and Lewis County have whistleblower policies. The state version is found at RCW 42.41.030 et seq. (Grievant's Ex. 30, 31, 32). The Lewis County whistleblower policy is found at Part 5 of the Lewis County Policy Manual (LCPM). In pertinent part, Part 5 states:

3) . . . employees who believe that the County or a County employee is engaged or involved in an improper governmental action *are required to submit a report* of the improper conduct to one of the below listed County Officials and permit sufficient time for a County report prior to submission to any outside entities.

- 4) Employees may report the improper governmental action to one of the following:
 - a) The employee's Department Director/Elected
 - b) The Board of County Commissioners
 - c) The County Sheriff
 - d) The County Prosecuting Attorney

LCPM Part 5, Whistleblower Policy (emphasis added). Thus, under the county policy, the act of making the report is itself mandatory. A county employee is *required* to report any potential improper government action. The only permissive part of the policy involves to whom an employee may make a report. Since, as the Commission pointed out, the Dept. has no formal internal affairs division, any suspected wrongdoing would need to be reported up the chain of command. (Decision, p.7, lns. 6 - 9). Where the chain of command might be complicit in the wrongdoing, as Deputy Sprouse feared his chain might be, then the next reasonable step to report wrongdoing, and especially wrongdoing that might be criminal in nature, would be to report to the Prosecutor's office, as indicated in the LCPM. Prosecutor Golden even confirmed that a law enforcement employee who wants to report potential employer misconduct should contact the on call deputy prosecutor. (RP 220, lns. 4 - 14).

This is buttressed by RCW 36.28.011, which indicates that it is the "duty of all sheriffs to make complaint of all violations of the criminal law, which shall come to their knowledge, within their respective jurisdictions." *RCW 36.28.011*. "Every deputy sheriff shall possess all the power, and may perform any of the duties, prescribed by

law to be performed by the sheriff . . .” *RCW 36.28.020*.

Deputies frequently make reports to the Prosecutor’s Office. Not all reports result in criminal charges being filed. Often, there is insufficient evidence of a crime. The report itself is not dispositive of whether charges are filed. The deputy reports, and the prosecutor decides whether the matter is worth pursuing. If the ruling from the *Decision* were to be applied to all of the other reports, then deputies would be subject to discipline up to and including termination every time they made a report that did not ultimately result in the filing of charges. In this particular instance, Prosecutor Golden even recognized the potential for conflicts of interest, and he forwarded the matter to an outside agency to investigate. (RP 223, lns. 5 – 16).

As noted *supra*, and contrary to every assertion by the Dept., the call had nothing to do with internal Dept. personnel matters, and there was never any evidence that it did. (See *e.g.* RP 221, lns. 1 – 11). Although Dept. Chief of Staff Steve Walton decided that the call was retaliatory, and used that as the basis for the termination, none of the testimony reflected an improper basis for the call. (Sheriff’s Ex. 29, p.2). To the contrary, even high ranking members of the Dept. recognized that the personnel matter was unrelated. Chief Walton himself specifically said of the timed letter “. . . as we all know, that’s a separate disciplinary matter, and not the subject of the current case.” (Sheriff’s Ex. 28, p.3). There was argument by the Dept. that Deputy Sprouse made the call for

retaliatory reasons, but “arguments of counsel are not evidence”. *State v. Perkins*, 97 Wn.App. 453, 460, 983 P.2d 1177, 1180 (1999). The call was instead a direct, foreseeable, and unfortunate result of the Dept.’s attempts to keep everything in house. The lack of clear, precise, well documented rules and procedures for handling internal affairs ultimately *required* that Deputy Sprouse place the telephone call to the prosecutor.

f. Deputy Sprouse’s Telephone Call was not Misconduct.

Under the Rules and Regulations of the Commission (RRC), Rule IX, a person covered by the rules may be discharged or demoted only for certain conduct. (Sheriff’s Ex. 25). Among the list are such items as conviction of a felony, misdemeanor, or gross misdemeanor involving moral turpitude; incompetency, inefficiency or dereliction of duty; dishonesty, insubordination, discourteous treatment, or an act or omission tending to injure the public service; dishonest, immoral, or prejudicial conduct; drunkenness or use of narcotics such that it interferes with duties; and any other act or failure to act that shows the individual is “unsuitable and unfit to be employed”. (Sheriff’s Ex. 20, p.1; Ex. 25). Thus, a broad array of misconduct can qualify as being for cause. The wording is substantially the same as that found in RCW 41.14.110. What the items share, however, is that they may properly be termed misconduct.

Here, the Commission’s findings specifically excluded every piece of misconduct, leaving only a telephone call that reported potential

misconduct on the part of others, a call that Deputy Sprouse was required to make, and that was constitutionally protected. *See infra*. The call was not accusing anyone of actually being a criminal; it was instead asking for an independent inquiry to determine if there had been any wrongdoing. (RP 168, lns. 12 – 15). Deputy Sprouse was faced with what is often termed as a Hobson's Choice²: shirk his duty and remain silent, thereby risking discipline or termination for failing to report possible misconduct, or make the report and face discipline or even termination for failing to keep everything in house. (RP 235, lns. 2 – 5).

Additionally, although there was speculation at the hearing that the relationship between the Dept. and the prosecutor's office may have been strained by Deputy Sprouse's report, there was no evidence of any actual harm to that relationship. (RP 124, ln. 3 – 125, ln. 7). Any harm was purely theoretical, and never materialized. (RP 208, lns. 22 – 25). As such, even if the telephone call to the prosecutor had been made with no basis, as alleged by the Dept. but not supported by the evidence, without some form of harm to the Dept., it "was an act which in no way disrupted the business of the sheriff's department. Although [the act] reflects a less than admirable sense of judgment which we do not condone, it does not demonstrate incompetency. Therefore, we hold . . . that as a matter of law the commission's severe discipline . . . does not constitute a disciplinary action taken in good faith for cause and

² The term 'Hobson's Choice' refers to a situation where there is no real choice. As the story goes, Hobson ran a stable and would insist that people take the horse in the stall nearest the door, however bad it may be, or no horse at all. The present situation is actually a Morton's Fork, or a choice between two equally horrid options.

therefore was contrary to law, if not arbitrary and capricious.” *Eiden v. Snohomish County Civil Serv. Com.*, 13 Wn.App. 32, 42 (1975) (*deputy answered telephone in name of another deputy as joke*).

The situation might have been different if Deputy Sprouse had turned to a newspaper or other public outlet to make a report. Instead, at least until the Commission hearing, which was attended by the public, his inquiries appear to have been kept within the government. (RP 127, lns. 1 – 2). Sgt. Snaza testified that he was hurt that Deputy Sprouse didn’t inform him of the call to the prosecutor. (RP 51, lns. 7 – 8). Despite this, he also testified that he had a good relationship with Deputy Sprouse, and that he had always been satisfied with his work. (RP 67, lns. 1 – 10). His only concern was the single, isolated incident of reporting potential wrongdoing to the prosecutor. *Id.*

The Commission confused the issue of whether Deputy Sprouse made his report in good faith with whether he was correct in his belief that a crime was possibly being perpetrated. Because the Commission determined that no crime occurred, they apparently worked backward from that conclusion to determine that Deputy Sprouse must have made his report vindictively, despite the complete lack of evidence for that conclusion. Certainly, Chief Walton testified that Deputy Sprouse was “pissed off”, and he (Chief Walton) perceived that as motivating retaliation, but what is important is what Deputy Sprouse intended. (RP 189, lns. 15 – 19). Deputy Sprouse said he was “pissed about the totality

of the situation”, about his being investigated, not about the letter. (RP 256, ln. 24 – 257, ln. 2; RP 232, lns. 19 – 21; RP 251, ln. 12 – 252, ln. 7; 253, lns. 1 – 9; RP 262, lns. 21 – 25). Even if the allegations turned out to be unfounded, Deputy Sprouse was still required to make his report, based on his perception of the situation. *Supra*, LCPM 5.

As has been noted repeatedly, including in the Dept.’s Hearing Brief, Deputy Sprouse was not subject to a demotion or loss of pay or benefits in the timed letter. (RP 256, lns. 11 – 13) He had received no other discipline during his time with the dept., aside from this sole incident. (RP 229, lns. 20 – 23). While he may not have liked receiving the timed letter, he lacked any motive to be vindictive. Deputy Sprouse had already begun the proper process to deal with the letter. (RP 139, lns. 19 – 23; Grievant’s Ex. 34). About the same time as he received the letter, he was even given one of 5 new patrol cars. (RP 256, lns. 17 – 23). Deputy Sprouse lacked any reason to be vindictive.

Instead of vengeance, Deputy Sprouse had a positive duty to report what he saw as potential wrongdoing, as noted *supra*. Reporting to his supervisors succeeded only in additional investigation of himself, thereby heightening the appearance that the Dept. was trying to hide something. In making the report, Deputy Sprouse did not hold a press conference; he did not write a letter to NBC. Instead, he placed a single telephone call to the prosecutor’s office, one of the few organizations on the list in the LCPM that was not potentially directly involved in the

matter. DPA Richardson testified that the DPA stands in the shoes of the prosecutor, performing the prosecutor's duties, and is an agent of the prosecutor. (RP 33, lns. 8 – 25). Prosecutor Michael Golden testified that he had even disseminated a memorandum to all law enforcement officers indicating how to contact his office after business hours. (RP 220, lns. 4 – 14). Deputy Sprouse was following those procedures.

g. Deputy Sprouse's Constitutional Rights were Violated.

Although there was argument by the Dept. before the Commission that the matter was a question of a state employee's right, or lack, to report *publically* on matters concerning employment, such is not the case. Harold Sprouse made a confidential report to the prosecutor's office, requesting an independent investigation. Even if the report had been made publically, the "fact that an investigation finds the report of suspected abuse to be without merit does not affect the importance of the content to the public." *White v. State*, 131 Wn.2d 1, 12, 929 P.2d 396, 404 (1997). The cases cited by the Dept. invariably involve discussions regarding when one is speaking publically as himself, or when one is speaking pursuant to one's position. Importantly for the present matter those cases, *Garcetti, et al*, were dealing with the Right to Free Speech in situations where that right was not specifically enshrined in the terms of employment.

In the present matter, Lewis County Sheriff's Deputies' Right to Free Speech on matters of Public Concern is specifically protected by

Lewis County Sheriff's Office Policies, 01.05.140(07)(C), which indicates that the right to free speech is protected, subject to the matter being of "public concern". (Sheriff's Ex. 26, p.38, Examples of Non-violations, Conflicts of Interest). A matter is of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). The possible commission of criminal acts by Sheriff's deputies would clearly be a matter of public concern, as would the reluctance of the Dept. to look into internal affairs. (RP 86, lns. 16 – 21; RP 90, lns. 5 – 10; RP 110, ln. 25 – 111, ln. 4). As a result, the analysis offered by the Dept. is misplaced.

Nonetheless, even under that analysis, since the criminal acts by the Dept. would have been a matter of immense and grave public concern, Deputy Sprouse' speech was protected by the Right to Free Speech and Dept. policies. Even the Court in *Garcetti* recognized the importance of similar situations, "Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, as a matter of good judgment, be receptive to constructive criticism offered by their employees. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." *Garcetti v. Ceballos*, 547 U.S. 410, 425, 126 S. Ct. 1951,

1962, 164 L. Ed. 2d 689 (2006) (*internal citations, punctuation omitted.*)

Consequently, to the extent that Deputy Sprouse's Free Speech rights were implicated, he had every right to speak. Notably, in the recent Justice Department investigation into the Seattle Police Dept., one of the items criticized was the culture of silence that allowed the misconduct to continue. Law enforcement agencies need people like Deputy Sprouse to be willing to report apparent misconduct before it gets to the level of systemic abuses.

The report of apparent misconduct is at the heart of this matter. Contrary to the Dept.'s assertions, at the Pre-Disciplinary Hearing, at the Loudermill Hearing, and before the Commission, the First Amendment issue discussed was the Right to Petition, not the Right to Free Speech. (Grievant's Ex. 22, p. 21; Sheriff's Ex. 28, p. 6; RP2 25, lns. 14 – 25). Few cases deal with the Right to Petition, and no known cases outline how to address the situation faced by Deputy Sprouse. As a deputy, he was required to report what he perceived as illegal behavior. *Supra*. Due to the horrible position in which he was placed, however, Deputy Sprouse was also the potential victim of the wrongdoing by being subjected to additional investigation for not keeping everything in house. As such, he was in a position that no deputy should ever have to face. Despite the huge potentially negative consequences and risks, he did as his position required and made the report. Instead of recognizing the untenable position in which the Dept. had placed Deputy Sprouse, the

Dept. instead retaliated against him, and terminated him in bad faith without cause.

That very report also falls within an individual's Right to Petition for Redress of Grievances. *See* U.S. Const. Am. 1. The Right to Petition for Redress of Grievances is, of course, separate and distinct from an employment grievance, as well as being separate and distinct from matters relating to Freedom of Speech. Despite bearing the same word 'grievance' the two are entirely different. Every citizen enjoys the right to report improper governmental actions. A deputy, however, is *required* to make such a report. As such, the directive not to speak to anyone about his concerns was a prior restraint on Deputy Sprouse's rights under the First Amendment to United States Constitution, as well as his rights pursuant to Article 1 §4 of the Washington Constitution.

Washington interprets Article 1 §4 of the Washington Constitution consistently with the First Amendment. *Richmond v. Thompson*, 130 Wn.2d 368, 383, 922 P.2d 1343, 1351 (1996) (*Declined to follow on other grounds*, *In re Marriage of Suggs*, 152 Wn. 2d 74, 80, 93 P.3d 161, 164 (2004)). In fact, "the right to petition extends to all departments of the government. Thus, the right to petition includes the rights to (1) complain to public officials and to seek administrative and judicial relief; (2) petition any department of the government, including state administrative agencies; and (3) file a legitimate criminal complaint with law enforcement officers." *In re Marriage of Meredith*, 148

Wn.App. 887, 899-900, 201 P.3d 1056, 1062 (2009) (*review denied*, 167 Wn.2d 1002 (2009)) (*internal citations omitted*). The right to petition the government extends even to those situations where the basis for the petition may be “based on unfounded rumors . . .”, and it is “irrelevant whether . . . complaints were reasonable or fair . . .”, so long as the intent was not “merely to harass”. *Meredith*, 148 Wn.App. at 900-901 (*citing Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir.1985) (*rev'd on other grounds by Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986)); and *Eaton v. Newport Board of Education*, 975 F.2d 292, 298 (*citing Omni Outdoor Advertising*, 499 U.S. at 380, 111 S.Ct. 1344; *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir.1989))).

It is certainly true that “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.” *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983). Every last scrap of the evidence conveyed the fact that this was not a matter only of personal interest, or indeed related to the personnel matter at all, but was instead about the larger picture of possible criminal acts by the Dept., a matter of immense public concern, that was handled discretely.

Furthermore, the Right to Petition carried with it immunity under the common law. *Richmond v. Thompson*, 130 Wn. 2d 368, 384, 922 P.2d 1343, 1351-52 (1996). Indeed, “the Court of Appeals has extended the absolute common law privilege to the investigatory phase of a quasi-judicial proceeding. And, other jurisdictions have recognized a common law absolute privilege in circumstances similar to this case.” *Richmond v. Thompson*, 130 Wn. 2d 368, 384, 922 P.2d 1343, 1351-52 (1996) (citing *Story v. Shelter Bay Co.*, 52 Wn.App. 334, 760 P.2d 368 (1988). *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985) (recognizing an absolute privilege for a citizen's complaint against a law enforcement officer); *Gray v. Rodriguez*, 481 So.2d 1298 (Fla.Dist.Ct.App.1986) (complaint to internal review panel concerning alleged police misconduct absolutely privileged); *Putter v. Anderson*, 601 S.W.2d 73 (Tex.Civ.App.1980) (citizen's complaints of police misconduct were absolutely privileged); *Campo v. Rega*, 79 A.D.2d 626, 433 N.Y.S.2d 630, 631 (N.Y.App.Div.1980), *appeal denied*, 52 N.Y.2d 705, 437 N.Y.S.2d 1028, 419 N.E.2d 876 (1981)). The lack of any internal review channel does not change that analysis.

The Supreme Court has determined that the Wash. Const. art. I, § 4 Right to Petition is not absolute. *Richmond v. Thompson*, 130 Wn.2d at 380. It is qualified by “for the common good” language. *Id.* “Recklessly made false statements are not in the common good.” *Id.* Deputy Sprouse’s statements, however, were neither false, *infra*, nor recklessly

made. He made a report based on his perception of the situation, and that report was made only after weeks of consideration and discussions.

At no point did Deputy Sprouse attempt to address the subject of the grievance, the timed letter, in his verbal report. Instead, and as noted by the Commission, Deputy Sprouse “. . . discussed the anxiety and belief that he was being intimidated as a potential witness . . .” (Decision, p.3, lns. 10 – 12). He did not ask that the letter be considered in any manner or form, and *nothing that he did report would have had any effect on the timed letter*. If Deputy Sprouse’s report had led to the filing of criminal charges, the letter would still have remained, to be addressed in the separate proceeding. Deputy Sprouse’s concerns were with the extreme nature of the investigation, not with the minimal and limited outcome of the timed letter. (RP 232, lns. ; 233, ln. – 234, ln. ; 246 lns. 5 – 10). Upon reporting what he believed to be illegal behavior, Deputy Sprouse was subjected to further investigation and was terminated from his position as a direct result of making his report. This despite the fact that once he made the report, he considered the matter at an end. (RP 250, lns. 21 – 23).

h. Deputy Sprouse was Placed in an Untenable Situation.

The Dept. made a huge fuss over Deputy Sprouse’s use of the phrase “I wanted to bring pressure down on the Dept.” (RP 250, lns. 24 – 25). When read in the full context of the investigation, however, Deputy Sprouse clearly was expressing what many victims feel – that he felt

powerless at the collective might of the Dept. to silence him. (RP 249, ln. 25 – 251, ln. 3). More specifically, he felt that the investigation ought to be handled by an outside agency.

The Commission determined that a deputy who has a good faith belief that a crime has been committed has “every right to communicate that” to the Prosecutor’s office. (Decision, p.6, lns. 1 – 4). It is unclear whether the Commission based their decision on the federal or state constitutions, on the statute, or on the policy. Regardless of the basis for the decision, nearly every witness in the record testified that Deputy Sprouse believed that the conduct of the Dept. was intended to harass, intimidate, or induce him to withhold information. (RP 243, ln. 21 – 244, ln. 4; RP 30, ln. 21 – 31, ln. 10; RP 38, ln. 22 – 39, ln. 2; RP 39, ln. 20 – 40, ln. 11; RP 47, lns. 2 – 14; RP 60, lns. 3 – 15; RP 136, lns. 4 – 8; RP 137, lns. 9 – 23; RP 168, lns. 12 – 23). Even Chief Walton conceded in response to a question regarding whether the investigatory visit to Deputy Sprouse’s house might be intimidation *per se*, that “. . . is that possible? Certainly. All it takes is to ask a question of somebody.” (RP 212, lns. 9 – 19).

“The standard definition of good faith is a state of mind indicating honesty and lawfulness of purpose.” *Whaley v. Dep’t. of Soc. & Health Serv.*, 90 Wn.App. 658, 669, 956 P.2d 1100 (1998) (*citing Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986)). Nothing in the record indicates anything aside from an honest

belief, and a lawful purpose. Whether Deputy Sprouse was acting in good faith is clearly distinguishable from whether he was *correct* in his belief, as discussed *infra*.

The Commission determined that Deputy Sprouse made his report in retaliation for the disciplinary action against him. (Decision, p.8, lns. 1 – 2). This is not only wholly unsubstantiated in the record, it is also contrary to the entire record. None of the evidence supports the contention that Deputy Sprouse was reporting improper handling of a personnel matter. Indeed, if it had turned out that Deputy Sprouse was correct about his suspicions, the language of RRC Rule IX, and its statutory counterparts, would have required discipline for *failing* to report to the prosecutor, particularly given the positive requirement to report found in the LCPM and RCW 36.28.011. (Sheriff's Ex. 25).

All of which simply serves to highlight the very reasons for having outside agencies review matters where there is even a *potential* conflict of interest. The concept remains true, even in those situations where there may be no *actual* conflict. Cmdr. Aust and Chief Brown had several reasonable reasons to investigate personally. They would not have wanted to hand the matter to someone who might potentially have been a suspect for example.

For Deputy Sprouse, who was not privy to their thought processes, however, their direct investigation appeared to be highly unusual, and only heightened the perception that undue pressure was

being applied. Additionally, when they did not call Deputy Sprouse as planned, the perception increased that the investigation was intended to harass Deputy Sprouse. (RP 108, lns. 3 – 14).

While Deputy Sprouse may not have been specifically instructed not to testify at a hearing, he perceived the directive not to talk to anyone as effectively an order to do just that – to coerce him to withhold information from an ongoing investigation, or to refuse to testify at the risk of losing his job and having his family harassed, as discussed *supra*. When the unusual investigatory methods were coupled with the directive not to speak to anyone, Deputy Sprouse believed he had no choice but to report the possible crime, even though he was worried it would cost him his job. (RP 262, lns. 21 – 25).

Further, the Commission indicated that it was “tempting . . . to consider reinstatement on equitable grounds. This is not the way to end an honorable thirty-two year career in law enforcement.” (Decision, p.7, lns 14 – 18). This comment indicates that the Commission realized that termination was an extraordinarily harsh resolution for the matter, particularly in light of the inaction against Sgt. Breen or any of the rest of the Dept., the lack of progressive discipline, and the solitary nature of the report. When the situation is considered within the full context of the investigation into the Sheriff’s actions, acts that were deemed to be misconduct, and the unpunished misdeeds and lawlessness of some members of the Dept., the outcome was horrific. (Grievant’s Ex. 28).

In a similar situation, the court has indicated that “as a matter of law the commission's severe discipline . . . does not constitute a disciplinary action taken in good faith for cause and therefore was contrary to law, if not arbitrary and capricious.” *Eiden v. Snohomish County Civil Serv. Com*, 13 Wn.App. 32, 42 (1975).

In reaching its decision, the Commission did not indicate the standard it used to evaluate the facts it found. Despite this, it is clear that the Commission did not apply the ‘for cause’ standard, let alone the ‘just cause’ standard as required by the CBA, *supra*. The lack of just cause and the complete absence of any evidence that Deputy Sprouse was attempting to address the personnel matter combine to effectively demonstrate that the Commission was itself not acting in good faith in addressing the situation. By disregarding the disparate treatment of other members of the Dept., and by choosing to disregard the entire body of evidence with respect to the reasons that Deputy Sprouse was required to make his report, the Commission itself disregarded *its* duty. The record is clear that the Commission completely ignored its duty to determine whether the termination was made in good faith for cause. Thus it is not in the least surprising that the Superior Court found that Deputy Sprouse had been wrongfully terminated.

Dept. subpart (e) relates to whether the Decision was “Arbitrary, Capricious or Contrary to Law.” The Commission’s Findings that Deputy Sprouse was not insubordinate, untruthful, or violative of his

chain of command have substantial evidence in the record, but they do not support the Termination. The one Finding that might support the Termination was that the call was placed in retaliation for the timed letter. Given the above, however, it is clear that particular Finding was entirely lacking in evidentiary support. Accordingly, the termination was Arbitrary; the termination was Capricious; the termination was Contrary to Law; and the termination was not made in Good Faith For Cause as required. Indeed, the termination was flatly Unconstitutional.

The question posed by the Dept. in subpart (f) relates to whether deference should be afforded the Decision of the Commission even if the Court disagrees with that Decision. In posing the question, the Dept. appears to be implying that the Decision itself should be accorded some special status such that the Decision should stand, even if it has no basis. As discussed *supra*, the Court engages in an independent review of the record. *Greig v. Metzler*, 33 Wn.App. 223, 226, 653 P.2d 1346, 1347 (1982). Findings are reviewed under the substantial evidence standard, while conclusions of law are reviewed *de novo*. *Morgan v. Dep't of Soc. & Health Services, State of Washington*, 99 Wn.App. 148, 151, 992 P.2d 1023, 1025 (2000). Where, as here, the Conclusion in the Decision is only supported by a Finding that had no evidence in the record, the Decision must be overturned.

i. Deputy Sprouse did not Make a False Report.

In the Dept. Assignment of error subpart (g) the Dept. begs the

question by assuming within the question itself that the report of possible criminal activity was false. There is a very basic and definite distinction between on the one hand, a report that ultimately is found to be baseless, and a report that is knowingly false. This distinction is even recognized in the Dept.'s Rules of Conduct. (Sheriff's Ex. 26, p. 37, §01.05.140 Examples of Non-Violations). Subpart 11(C) specifically references that it is not a violation to file information that proves to be wrong when the member had no intent to be in error. *Id.*

This distinction can perhaps be illustrated if we suppose for the sake of argument that Deputy Sprouse had seen a fellow deputy appear to murder his wife. Faced with such a situation, he would have been required to report, and to take such steps as were necessary to apprehend that deputy. If he reported what he saw to two supervisors and was told to ignore it, and he was further subjected to an investigation for making the report on orders from the lofty reaches of the administration, then he might very reasonably be concerned that the entire organization was complicit in the apparent murder.

Under such circumstances, a report outside the agency would not only be prudent, but it would be necessary. If it later was revealed that the deputy and his wife were merely rehearsing a death scene in a play, then Deputy Sprouse would clearly have been wrong about whether a criminal act had occurred, but just as clearly still correct to have attempted to report the apparent homicide, and even to make the report

to an outside agency. His perception that the Dept. was complicit would only have been heightened if most of the Dept. knew about the play, and so kept telling him to forget what he had seen, without explaining that it was only a rehearsal. Under such circumstances, the fact that Deputy Sprouse might have been displeased with a separate action of the Dept. in close proximate time to such a report would be irrelevant in the situation, and it is a similar red herring here.

Furthermore, and as discussed *supra*, the Dept. infringed on Deputy Sprouse's First Amendment rights, and it terminated him without just cause and in bad faith. No deputy should be subjected to investigation or termination merely for recognizing a clear conflict of interest and making a request that it be investigated.

Finally, subpart (h) simply poses the question whether the Decision of the Lewis County Civil Service Commission should be upheld, while reversing the Superior Court. Given the foregoing, the answer clearly is 'No'. As indicated *supra*, the Decision of the Commission was wholly unsupported by the record. The Superior Court clearly recognized this, and reversed the Commission. The Superior Court Decision should be upheld, while the Commission should be reversed.

IV. CONCLUSION

When viewed as a whole, the Commission's Decision is not supported by the evidence. Although ample evidence existed in the

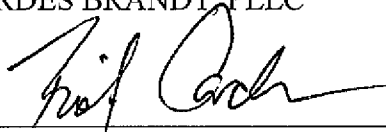
record that Deputy Sprouse was not insubordinate, violative of his chain of command, or dishonest, there was simply no evidence that Deputy Sprouse had any purpose other than to report what he honestly, even if perhaps mistakenly, believed to be potential wrongdoing by his employer. Any deputy who came to harbor the same suspicions would have been required to make the same report.

Deputy Sprouse made attempts to progress up his chain of command within the Dept., and for that he was subjected to further investigation, to further pressure to be silent. When Deputy Sprouse was specifically asked whether he had spoken with anyone prior to the fact finding with Sgt. Smith, he answered truthfully. Since nobody can order a deputy not to make a report of potentially criminal activity, he was not insubordinate, and since Deputy Sprouse clearly had a basis, whether or not he was correct, for reporting his belief, the Finding that he lacked a good faith basis for his report must be overturned, as was done by the Superior Court.

The lack of supporting evidence, and the clear disconnect between the Commission's Findings and the Decision, including the wholly unsupported and clearly erroneous Finding that Deputy Sprouse lacked a good faith basis for his report, combine to form the result that the Decision of the Commission was Clearly Erroneous, Arbitrary and Capricious, Unconstitutional, and Error of Law.

DATED this 25th day of April, 2012.

CORDES BRANDT, PLLC

A handwritten signature in black ink, appearing to read "Rick Cordes", written over a horizontal line.

RICK CORDES, WSBA #5582
Attorney for Petitioner

CORDES BRANDT, PLLC

A handwritten signature in black ink, appearing to read "James Laukkonen", written over a horizontal line.

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Attorney for Petitioner

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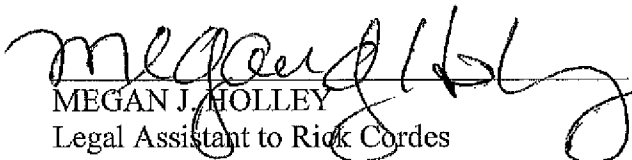
I certify that I served a copy of these documents on all parties or their counsel of record on April 25, 2012 electronically.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of April, 2012, at Olympia, WA.


MEGAN J. HOLLEY
Legal Assistant to Rick Cordes

CORDES BRANDT, PLLC
April 25, 2012 - 3:52 PM

Transmittal Letter

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